80-1584

No. _____

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In the Supreme Court of the United States

October Term, 1980

In the Matter of James F. CRIST, JR.,

Debtor,

James F. CRIST, Jr., Debtor, in

possession, Appellant,

Petitioner,

vs.

Jane S. CRIST, Appellee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN M. SIKES, JR.
(Counsel of Record)
MACEY & ZUSMANN
JAMES W. PENLAND
THOMAS D. RICHARDSON
1795 Peachtree Road
Atlanta, Georgia 30367
(404) 897-7200

Docketed: _____

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QUESTIONS PRESENTED

Where the Court of Appeals held that, by providing the benefits of dischargeability for alimony owed by wives, but not that owed by husbands, Section 17a(7) of the Bankruptcy Act of 1898 (former 11 U.S.C. § 35a(7)) violated the equal protection component of the due process clause of the Fifth Amendment, did it err:

(1) by refusing to declare same a nullity?

(2) by extending the burden of nondischargeability to wives who were never intended to be burdened by the statute?

(3) by refusing the husband the benefit of dischargeability which is available to wives.

II

PARTIES

The caption of the case does not contain the names of all parties inasmuch as the Court of Appeals consolidated two separate actions on appeal. The second action is In the Matter of Frederick H. PINKERTON, Jr., Bankrupt, Frederick H. PINKERTON, Jr., Appellant vs. Betty Jane PINKERTON, Appellee.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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In the Matter of JAMES F. CRIST, JR.,

Debtor,

James F. CRIST, Jr., Debtor, in

possession, Appellant, Petitioner,

vs.

JANE S. CRIST, Appellee,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

_____

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 632 F.2d 1226 (1980), and is reproduced at pages A1-A36 of the Appendix.

The Opinion and Order of the District Court is reported at 460 F.Supp. 891 (N.D. Ga. 1978) and is reproduced at pages A37-A56 of the Appendix. The Opinion and Order of the Bankruptcy Court was not officially reported and is reproduced at pages A57-A74 of the Appendix.

JURISDICTION

The Court of Appeals' decision sought to be reviewed herein was dated and entered on December 17, 1980. Accordingly, the instant Petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

The Court of Appeals' decision on which this Petition is taken is appropriate for review on certiorari under Supreme Court Rule 17.1(a) and (c) in that: the Court of Appeals has declared a federal statute unconstitutional but has attempted to remedy the constitutional defect in a manner which is in direct conflict with

the directions of the Supreme Court for applying remedies to defective statutes. Welsh v. United States, 398 U.S. 333 (1970); Gomez v. Perez, 404 U.S. 535 (1973) and Califano v. Westcott, 443 U.S. 76 (1979).

STATUTES AND RULES INVOLVED

Section 17a(7) of the Bankruptcy Act of 1898, 11 U.S.C. § 35a(7) provides in pertinent part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... are for alimony due or to become due, or for maintenance or support of wife....

(Section 17(a) is set out in its entirety at pages A75-A78 of the Appendix.)

STATEMENT UNDER RULE 28(b)

Since the proceeding draws into question the constitutionality of Section 17a(7) of

the Bankruptcy Act of 1898 (former 11 U.S.C. § 35a(7)), an Act of Congress affecting the public interest, and neither the United States, nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable. No Court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

On February 24, 1978 the United States moved to intervene in the Bankruptcy Court pursuant to 28 U.S.C. § 2403; the Motion was granted the same day; the intervenor withdrew the intervention on May 9, 1978.

STATEMENT OF THE CASE

Jane S. and James F. Crist were granted a divorce by a Georgia court on March 4, 1977. The parties executed a separation

agreement, incorporated into the divorce decree, providing that the husband would pay the wife $30,000 in a lump sum upon the sale of their house, or in installments which were to be completed by March 1978. James Crist further agreed to pay Jane Crist: as alimony, the sum of $350 per month until the aforementioned $30,000 was paid in full: $5,000 for attorney's fees she had incurred; and $350 per month for the support of their minor daughter. Both the $30,000 and $5,000 obligations were evidenced by promissory notes. Crist secured these obligations by executing a deed to the house which transferred a security interest to his former wife. He also agreed to transfer certain personal effects, including home furnishings and an automobile.

James Crist paid $7,500 in March 1977, $2,500 of which was in payment on the

$5,000 attorney fee commitment with the remainder applicable to the $30,000 note. In April 1977, he paid $2,500 on the $30,000 note. During the months of April and May, 1977, he paid the monthly alimony stipends of $350.

James Crist made no payments after the May 1977 alimony installment. He filed a Chapter XII bankruptcy petition in July 1977. The instant proceeding was filed as an adversary proceeding to determine the dischargeability of Crist's obligation to his wife prior to filing a Plan of Arrangement under Chapter XII. The constitutional issue of the dischargeability of the obligations due Jane Crist under Section 17a(7) was presented to the Bankruptcy Court, which ruled that none of the above listed obligations were dischargeable. The Bankruptcy Court found a balance of $22,500 due on the $30,000 note $2,500 due

on the $5,000 attorney's fee note and an accrued arrearage on the $350 monthly alimony payments, through February 1978, of $3,150, and concluded that Section 17a(7) was constitutional and proscribed a discharge of any of these debts as all were alimentary obligations.

The District Court affirmed the bankruptcy court's decision upholding the constitutionality of Section 17a(7). On appeal the Court of Appeals reversed the District Court and found Section 17a(7) unconstitutional. Instead of nullifying the statute, it formulated a remedy, the result of which denied discharge of the debt. The Petition seeks review of the formulation of the remedy, given the prior finding that the statute is unconstitutional.

Federal jurisdiction in the court of first instance was based upon Sections 2(a)(12), 411 and 452 of the Bankruptcy

Act of 1898, formerly 11 U.S.C. §§ 11(a)(12), 811 and 852.

ARGUMENT

In the case below, the Fifth Circuit properly declared Section 17a(7) of the Bankruptcy Act of 1898 (former 11 U.S.C. § 35a(7)) unconstitutional because it violated the equal protection component of the Due Process Clause of the Fifth Amendment. The Fifth Circuit then sought to avoid the effect of holding Section 17a(7) unconstitutional by formulating a remedy which left the statute operable notwithstanding its unconstitutionality, and at the same time defeated the legislative purpose.[1] The Court erred by its

---

1. The issue of the constitutionality of Section 17a(7) has recently been the subject of much judicial scrutiny with a variety of conflicting decisions and remedial approaches. In re Wasserman, CCH Bankr. L. Rep. ¶ 66,471, 3

remedying Section 17a(7)'s constitutional defect by extending the burdens placed by the statute upon men to women and by denying men the benefits of discharge given to women by the statute.

Section 17a(7) discriminates on the basis of gender because it is underinclusive. A statute conferring a benefit is "underinclusive" if it excludes from benefits those persons who, but for the

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BCD 467 (U.S. Bankr. Ct., D. R.I. 1977) (found Section 17a(7) unconstitutional and extended benefit of discharge to husband); In re O'Bryan, 5 BCD 946 (U.S. Bankr. Ct., W.D.Ky. 1979)(found Section 17a(7) unconstitutional and extended benefit of discharge to husband); In re Baird, 4 BCD 926 (U.S. Bankr. Ct., S.D.Fla. 1978)(upholding constitutionality of Section 17a(7) but reading statute gender neutral and implying nondischargeability of alimony payable by wife in dicta); In re Kelly, 4 BCD 648 (U.S. Bankr. Ct., M.D.Tenn. 1978)(upholding constitutionality of Section 17a(7) under important governmental objective test); In re Stimson, 4 BCD 441 (U.S. Bankr. Ct. D.Colo. 1978) (upholding constitutionality of Section 17a(7) reading "wife" to mean "spouse" and rendering statute gender neutral); Votoloto, A Review of Recent Equal Protection Challenges to the Dischargeability-of-Alimony provision of Section 17a(7) of the Bankruptcy Act, 13 Suffolk Univ. L. Rev. 506 (1979).

statute's classification, would have been entitled to them. Discharge of an alimony obligation is always like a two-edged sword. Alimony is a private burden on the payor and a private benefit on the payee. Thus, while there are benefits under Section 17a(7), there are also burdens. The benefits are inseparable from the burdens. Section 17a(7) is underinclusive because it allows a wife to discharge her alimony obligations owing to a husband while it denies that same benefit of discharge to a similarly situated husband. Section 17a(7) prevents husbands from discharging alimony obligations owed to wives. It also denies protection to husbands receiving alimony from having the alimony owed them discharged by wives. Under the operation of Section 17a(7), wives always benefited and husbands were always burdened. The difference in treatment is purely gender based.

The legislative purpose of Section 17a(7) was to protect wives from losing their alimony benefits upon bankruptcy of their husbands, whether or not dependent, and to provide that wives in bankruptcy may escape any alimony obligations they may have and thereby to obtain a fresh start without regard to their husband's dependency. The legislative purpose was reviewed by the Fifth Circuit below at 632 F.2d 1232 in a quote from Wetmore v. Markoe, 196 U.S. 68, 77:

> [T]he bankruptcy law should receive such an interpretation as will effectuate its beneficient purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce.

The Fifth Circuit found this legislative purpose to be discriminatory and thus declared the statute unconstitutional in the case below.

The Supreme Court has established the appropriate remedy to be followed by a court which finds a constitutional defect in a statute resulting from a denial of equal protection. In Welsh v. United States, 398 U.S. 333, 361 (1970), and in Califano v. Westcott, 99 S.Ct. 2655, 2663 (1979)

> Where a statute is defective because of underinclusiveness ... there exists two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefit not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion. [This rule will hereinafter be referred to as the "Welsh/Westcott" rule.]

After declaring Section 17a(7) unconstitutional for gender-based discrimination, the Fifth Circuit, in formulating a remedy to the statute's defects, applied a corrupted version of the Welsh/Westcott rule which fully ignored Section 17a(7)'s legislative purpose. The Fifth Circuit

stated its remedial approach to the rule as follows:

> The remaining question is whether to declare the entire subsection a nullity and deny its benefits to both groups, or to extend its coverage and provide equal benefits to both groups. We opt for the latter, following the path blazed by the Supreme Court in, inter alia, Califano v. Westcott, supra, Califano v. Goldfarb, supra, Weinberger v. Wiesenfeld, supra, and Wengler v. Druggists Mut. Ins. Co., supra ....
>
> We conclude that the proper remedy in the case at bar is to extend the benefits of § 17(a)(7) to the excluded class. Accordingly, either a husband or wife receiving alimony or maintenance or support may assert the nondischargeability of the obligation under § 17(a)(7).

While the Fifth Circuit "opted for the latter," in fact, they did the "former," that is, they effectively denied the statute's benefits of discharge and fresh start to both groups. The Fifth Circuit failed to recognize that in this situation for every benefit there is a corresponding burden. By extending the benefit of

protection from discharge to a husband receiving alimony, maintenance or support, the Fifth Circuit removed a woman's right to discharge her debts such as are for alimony due or to become due, or for the maintenance or support of husband which are accorded her under the plain language of the statute.

The operation of the Fifth Circuit's remedy is in direct conflict with the stated legislative purposes of Section 17a(7) as set forth in Wetmore v. Markoe. By "opting for the latter" and doing the "former," the Fifth Circuit has misapplied the remedial procedures set out by the Supreme Court in Welsh, supra, Westcott, supra, and their progeny.[2]

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2. In Gomez v. Perez, 409 U.S. 535 (1973) the Supreme Court invalidated a Texas statute which denied illegitimate children the right to support from their natural fathers. If the Fifth Circuit's approach in Crist of extending petitioner's

The Welsh/Westcott rule relies heavily on a close scrutiny of the legislative intent supporting a defective statute in formulating a remedy. The Supreme Court has emphasized that in choosing a remedy for a statute defective for underinclusiveness, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme, and a court should not use its remedial powers to circumvent the intent

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burden of parental non-support to all similiarly situated children had been applied in Gomez, the result would have been the denial of the right to support for all children from their natural fathers.

In Welsh v. United States, supra, the court had the alternative of either extending the burden of military service to all persons who conscientiously objected to military service upon religious grounds or of extending the benefit of conscientious objector status to petitioner, and allowing him exemption from military service. Had the court adopted the "extension of burden" remedy followed by the Crist court, the result in Welsh would have been a denial of conscientious objector status to everyone. Such a decision would have cured the equal protection defect, but it would have totally defeated Congress' purpose of protecting freedom of conscience.

of the legislature. Under no circumstances should the remedy of extension of benefits be applied to defeat the legislative purpose of the defective provision.

In Kalina v. Railroad Retirement Board, 541 F.2d 1204, aff'd mem., 431 U.S. 909 (1977) the Supreme Court adopted the Sixth Circuit's declaration that Section 2(f) of the Railroad Retirement Act of 1937 was void on the grounds of violation of the equal protection component of the Fifth Amendment resulting from sex discrimination. The Sixth Circuit found the statute to be defective because it was underinclusive. Under the Welsh test, the Court had the alternative of extending the benefits of the Retirement Act to male spouses without regard to proof of dependency on the same terms as applied to female spouses, or to require that female spouses meet the same dependency test that were required for male spouses. The Court refused to extend

the burden of requiring widows to prove dependency stating:

> This result would be contrary to the considered decision of Congress that spouses of male railroad workers are to be conclusively presumed dependent. And courts cannot disregard directions of Congress so long as they are constitutional. It would incongruous if in adopting a remedy for a constitutional violation by the legislature we were to engage in improper judicial conduct.

Id., 541 F.2d at 1210.

In Califano v. Westcott, supra, the Supreme Court affirmed the District Court's holding that Section 407 of the Social Security Act (42 U.S.C. § 607), which provided benefits to families whose dependent children were deprived of parental support because of the unemployment of the father, but did not provide for children deprived of parental support because of the unemployment of the mother, was violative of the Due Process Clause of the Fifth Amendment because it discriminated on the basis of gender. The course of

action adopted by the Court in remedying the underinclusive statute was to extend the benefits to families in which either the mother or father was unemployed. In a part concurring, part dissenting opinion, Justice Powell, joined by the Chief Justice, Justice Stewart and Justice Rehnquist, agreed that Section 407 of the Social Security Act was violative of the equal protection component of the Fifth Amendment, but disagreed with the remedy of extension of benefits. Justice Powell stated that this "extension [of benefits] reinstates a system of distributing benefits that Congress rejected when it amended Section 407 in 1968. Rather than frustrate the clear intent of Congress, the Court simply should have enjoined any further payment of benefits under the provision found to be unconstitutional." Califano v. Westcott, supra, 99 S.Ct. at 2666. Furthermore, Justice Powell stated "Rather than

thus rewriting § 407, we should leave this task to Congress.... We cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed." Id.

In casting its remedy for the constitutional defects of Section 17a(7) by denying wives a fresh start in bankruptcy and by protecting men from a discharge of alimony payments due them from wives who are in bankruptcy, the Fifth Circuit has perverted the clear purpose of Section 17a(7) which is plainly to favor women over men. Section 17a(7) was never intended to protect similarly situated men. The Court's decision is a "lateral step" that robs the legislation of its meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution. See Welsh v. United

States, supra, 398 U.S. at 354 (Justice Harlan concurring).

It is thus clear that in ignoring the legislative purpose of Section 17a(7) and creating a new statute out of whole cloth, the Fifth Circuit's remedy is improper. In this circumstance, the proper remedy, considering the legislative purpose of the act, is to declare the entire section a nullity and to extend the benefit of discharge in bankruptcy of alimony obligations to include men as well as women.

A complete statement of the remedy for underinclusive statutes can be stated. Where a statute is defective because of underinclusiveness there are two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or a Court may extend the coverage of the

statute to include those who are aggrieved by the exclusion. But in either case, the exclusion or the extension of benefits must not contravene the clear purpose and intent of the legislature. If a remedy consistent with the legislative intent cannot be cast, then the statute must simply be declared void.

Under this test the only remedy that can be applied to the defects of Section 17a(7) is to declare the section void and a nullity and thereby extend the benefit of discharge in bankruptcy to husbands as well as wives.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN M. SIKES, JR.
(Counsel of Record)
MACEY & ZUSMANN
1795 Peachtree Road
Atlanta, Georgia 30367
(404) 897-7200

APPENDIX

Nos. 78-3575, 79-1114.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

In the Matter of James F. CRIST, JR.,

Debtor.

James F. CRIST, Jr., Debtor, in

possession, Appellant,

v.

Jane S. CRIST, Appellee.

In the Matter of Frederick H. PINKERTON,

Jr., Bankrupt.

Frederick H. PINKERTON, Jr.,

Appellant,

v.

Betty Jane PINKERTON, Appellee.

Decided and Filed December 17, 1980.

James W. Penland, Atlanta, Ga., for James F. Crist, Jr.

Charles A. Ratz, Atlanta, Ga., for Jane S. Crist.

T. Brian Glass, Wilbur T. Fitzgerald, Atlanta, Ga., for Frederick H. Pinkerton, Jr.

Joseph J. Burton, Jr., Atlanta, Ga., for Betty Jane Pinkerton.

Appeals from the United States District Court for the Northern District of Georgia.

Before RUBIN and POLITZ, Circuit Judges, and POINTER*, District Judge.

POLITZ, Circuit Judge:

These cases were consolidated on appeal because both concern, inter alia, the constitutionality of § 17(a)(7) of the Bankruptcy Act of 1898, codified in 11 U.S.C. § 35(a)(7), which was modified and

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* District Judge of the Northern District of Alabama, sitting by designation.

replaced subsequent to this suit by the Bankruptcy Reform Act of 1978, 11 U.S.C. § 523(a)(5). In each case the district court affirmed findings by the bankruptcy judge that the debts involved were non-dischargeable alimony obligations. For the reasons assigned, we affirm the decision of the district court in each case.

A. The Pinkertons

Betty Jane and Frederick H. Pinkerton were married in Miami, Florida in 1948 and had three children prior to being divorced there in 1969. The Florida divorce decree incorporated two agreements. The first, dated March 1, 1968, required the husband to provide the wife with periodic support and maintenance payments which were subject to increase if the husband's income increased and were to terminate upon the wife's remarriage. This agreement also contained provisions for support of the parties' three children. The second accord,

executed on July 11, 1969, reaffirmed the first agreement and provided for a payment of $35,000 in case as "full and final settlement and division of property between husband and wife." Frederick Pinkerton paid the $35,000, moved to Georgia and later remarried. Subsequently, Betty Jane Pinkerton filed suit in Georgia alleging that her former husband had fallen into arrears, totalling $13,000, under the alimony and child support provisions of the March 1968 accord. That litigation was settled on May 21, 1975, by a compromise agreement which expressly superseded all prior agreements. The compromise provided for the lump sum payment of $10,000 for the alimony and child support arrearage, and the delivery of a promissory note for $30,000 payable in 36 monthly installments of $833.33. The note provided penalities for default, specifically acceleration of the unpaid balance, 8%

interest and attorney's fees. The 1975 settlement agreement further provided:

> The aforesaid promissory note of $30,000 being delivered to the wife as full and final settlement of any and all claims for any and all alimony, support, and all other benefits, rights and privileges to which the wife is now entitled, has been entitled, and may or will be entitled to in the future by virtue of the former Agreements of the parties. Said note represents full, final and absolute settlement of all benefits due the wife under the aforesaid Agreements and Decree of Divorce.

In June 1975, the Florida court approved the compromise settlement, amended the Pinkertons' divorce decree to include the new accord, and adopted a stipulation of the parties which delared, in pertinent part:

> [T]he [settlement] Agreement of May 21, 1975 [is] a true and accurate reflection of [the Pinkertons'] intentions as to alimony and other property dispositions to which they have agreed, and that said Agreement is executed pursuant to paragraph 15

of their original Agreement of March 1, 1968.[1]

Frederick Pinkerton initially complied with the 1975 agreement by making the $10,000 payment and four monthly payments. He thereafter defaulted and filed a voluntary petition in bankruptcy, listing as a debt, for which he sought a discharge, the balance on the $30,000 note. Betty Jane Pinkerton was granted a summary judgment accelerating the principal balance due, plus interest, but was denied attorney's fees, without prejudice, pending final disposition of the debt--discharge issue. The bankruptcy judge opined that § 17(a)(7) precluded a discharge of the alimony obligation; the district court affirmed this conclusion.

---

1. Paragraph 15 of the March 1, 1968 agreement, which established the alimony and child support schedules, stated: "No modification or waiver of any of the terms of this agreement shall be valid unless in writing and executed with the same formality as this agreement."

On appeal, Frederick Pinkerton poses two alternative theories in support of his claim of entitlement to a discharge. First, he insists that the non-discharge provisions of § 17(a)(7) are inapplicable to his situation because the May 1975 agreement involved a property settlement and not alimony. Second, he asserts that § 17(a)(7) creates an impermissible gender-based classification which is violative of the due process clause of the Fifth Amendment. We discuss these contentions in Parts I, II and III below.

B. The Crists

Jane S. and James F. Crist were granted a divorce by a Georgia court on March 4, 1977. The parties executed a separation agreement, incorporated into the divorce decree, providing that the husband would pay the wife $30,000 in a lump sum upon the sale of their house, or in installments which were to be completed by March 1978. James Crist further agreed to pay Jane

Crist: as alimony, the sum of $350 per month until the aforementioned $30,000 was paid in full; $5,000 for attorney's fees she had incurred; and $350 per month for the support of their minor daughter. Both the $30,000 and $5,000 obligations were evidenced by promissory notes. Crist secured these obligations by executing a deed to the house which transferred a security interest to his former wife. He also agreed to transfer certain personal effects, including home furnishings and an automobile.

James Crist paid $7,500 in March 1977, $2,500 of which was in payment on the $5,000 attorney fee commitment with the remainder applicable to the $30,000 note. In April 1977, he paid $2,500 on the $30,000 note. During the months of April and May, 1977, he paid the monthly alimony stipends of $350.

James Crist made no payments after the May 1977 alimony installment. He filed a bankruptcy petition in July 1977. The issue of the dischargeability of the obligations due Jane Crist was presented to the bankruptcy court, which ruled that none of the above listed obligations were dischargeable. The bankruptcy court found a balance of $22,500 due on the $30,000 note, $2,500 due on the $5,000 attorney's fee note and an accrued arrearage on the $350 monthly alimony payments, through February 1978, of $3,150, and concluded that § 17(a)(7) proscribed a discharge of any of these debts as all were alimentary obligations. The bankruptcy court rejected the contention that § 17(a)(7) created a gender classification inconsistent with the Fifth Amendment and the contention that the obligations at issue constituted a voidable preference under § 60 of the

Bankruptcy Act, 11 U.S.C. § 96. The district court, 460 F.Supp. 891, affirmed.

On appeal, James Crist asserts the same Fifth Amendment and voidable preference arguments that were presented to the bankruptcy court. We discuss these contentions in Parts III and IV below.

Part I: Alimony or Property Settlement

Two tribunals, the bankruptcy court and the district court, have classified the Pinkertons' May 1975 agreement as an alimony accord. Under the relevant standard of review, findings of fact are not to be disturbed unless clearly erroneous. "The test ... is not whether a different conclusion from the evidence would be appropriate, but whether there is sufficient evidence in the recored to [reflect] clear error in the trial judge's findings." Matter of Bardwell, 610 F.2d 228, 230 (5th Cir. 1980). Frederick Pinkerton insists that the facts in the record support his

position with the force and urgency required by this standard. Characterization of the $30,000 note as a property settlement unquestionably would make it a dischargeable debt, not subject to § 17(a)(7), which provides in relevant part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... are for alimony due or to become due, or for maintenance or support of wife or child ....

Resolution of this issue requires a determination of the intention of the parties, as reflected by the substance of the agreement, viewed in the crucible of surrounding circumstances as illuminated by applicable state law. In re Nunnally, 506 F.2d 1024, 1027 (5th Cir. 1975); In re Smith, 436 F.Supp. 469, 476 (N.D.Ga. 1977); Golden v. Golden, 411 F.Supp. 1076, 1078 (S.D.N.Y.), aff'd, 535 F.2d 213 (2d Cir. 1976).

Several facts convince us that the Pinkertons intended the May 1975 compromise to

constitute an amended alimony agreement rather than a property settlement. The July 1969 agreement stated that "the husband agrees to pay the wife as full and final settlement and division of property between the husband and the wife, the sum of Thirty-Five Thousand ($35,000.00) Dollars cash." (Emphasis added.) Upon payment of this amount, the property settlement was complete. Before addressing the substantive alimony provisions, including the terms of the $30,000 note, the May 1975 agreement declared that "the parties are desirous of reforming and revising said Agreements and wish to modify same as provided for in paragraph 15 of said Agreement of March 1, 1968." Moreover, the stipulation between the Pinkertons attested to the fact that the May 1975 accord was "executed pursuant to paragraph 15 of their original Agreement of March 1, 1968."

The March 1968 agreement involved alimony

and child support. The July 1969 instrument related to the property settlement, was concluded and no longer executory when, in May 1975, the alimony arrearage litigation was compromised and settled. The evidence is overwhelming that the $30,000 note Frederick Pinkerton signed and delivered to Betty Jane Pinkerton related to his alimony obligation and was not a part of a property partition.

Reference to Florida law, as appropriately made by the district court, confirms this analysis and characterization of the $30,000 note. When disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy. 1A Moore's Federal Practice ¶ 0.325 (2d ed. 1979). Numerous factors support the reference to Florida law. The Pinkertons were married

in Florida, resided in Florida and were divorced in Florida. The 1968, 1969 and 1975 agreements

were all submitted to the Florida court for approval and inclusion in the Florida divorce decree. The 1975 compromise arose out of litigation looking to the declaration and collection of an arrearage in alimony and child support accruing under the 1968 court-approved alimony and support agreement.

In the context of divorce decree modification disputes, Florida courts "are concerned with the substance and not the form of the payments." Fagan v. Lewis, 374 So.2d 18, 20 (Fla.App. 1979). Accord, White v. White, 338 So.2d 883 (Fla.App. 1976). That the parties may designate payments "alimony" does not necessarily make the payments alimony from a legal standpoint. The opposite must necessarily follow: that one or both parties might label a payment something other than alimony will not

change its character if indeed from the substance of the payment it is clearly alimony. The $30,000 note is evidence of Frederick Pinkerton's obligation to pay alimony to Betty Jane Pinkerton and, as such, comes under the aegis of § 17(a)(7).

Part II: Interest and Attorney's Fees

The May 1975 note contained the following provision:

> [I]n the event any one of the aforesaid thirty-six (36) installments is not made within ten (10) days of the date it is due, then upon written notice to the undersigned and his failure to tender said payment within seven (7) days, the Holder of this Note shall have the right to declare the remaining unpaid installments due, and the right of action on all unpaid installments for principal, plus interest accruing at the rate of eight (8%) per cent per annum on the unpaid principal from the date of such written notice, plus attorney's fees of ten (10%) per cent and all court costs....

When Frederick Pinkerton defaulted on his payment schedule, Betty Jane Pinkerton sent a letter demanding payment within seven days, "or the entire unpaid balance

of the note will be accelerated."[2]

Citing § 63(a)(1) of the Bankruptcy Act, 11 U.S.C. § 103(a)(1),[3] Frederick Pinkerton contends that his former wife is not entitled to interest after the date the petition in bankruptcy was filed. His recitation in brief of the general rule on interest, as it applies to provable fixed liabilities, is correct. See Sexton v. Dreyfus, 219 U.S. 339, 31 S.Ct. 256, 55 L.Ed. 244 (1911). He errs, however, when he seeks to apply the limitation of interest

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[2] We recognize that the bankruptcy and district courts deferred consideration of the attorney's fee question. Because we dispose of all substantive questions, the interest and attorney's fee issues, which are matters of law, are ripe for review and are resolved.

[3] 11 U.S.C. § 103(a)(1) provides:
(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

rule to non-dischargeable debts. In Bruning v. United States, 376 U.S. 358, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964), the Supreme Court, in holding that taxes subject to the non-discharge provisions of § 17 are not insulated from accruing interest charges, stated:

> It is undisputed that, under § 17, petitioner remained personally liable after his discharge for that part of the principal amount of the tax debt and pre-petition interest not satisfied out of the bankruptcy estate. The courts below held that, under § 17, petitioner also remained personally laible for post-petition interest on the tax debt, and we find no substantial reason to reverse that holding. Initially, one would assume that Congress, in providing that a certain type of debt should survive bankruptcy proceedings as a personal liability of the debtor, intended personal liability to continue as to the interest on that debt as well as to its principal amount. Thus, it has never been seriously suggested that a creditor whose claim is not provable against the trustee in bankruptcy loses his right to interest in a post-bankruptcy action brought against the debtor personally. In most situations, interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a con-

> tinuing debt. Interest on a tax debt would seem to fit that description. Thus, logic and reason indicate that post-Petition interest on a tax claim excepted from discharge by § 17 of the Act should be recoverable in a later action against the debtor personally, and there is no evidence of any congressional intent to the contrary.

376 U.S. 360, 84 S.Ct. at 907. Accord, Hugh H. Eby Co. v. United States, 456 F.2d 923 (3rd Cir. 1972); In re Romero, 535 F.2d 618 (10th Cir. 1976).

We hold that interest continues to accrue on the alimony obligation as an integral part of that obligation. We likewise hold that the attorney's fee provision is an integral part of the alimony obligation represented by the promissory note. Florida courts will enforce express stipulations for attorney's fees which are integral parts of alimony agreements. See Scott v. Scott, 303 So.2d 683 (Fla.App. 1974); Howell v. Howell, 207 So.2d 507 (Fla. 1968).

We reach the same conclusion with respect to the balance due for attorney's fees in the Crist case. Considering the totality of that situation, we find that the balance due on the note given in evidence of the agreement to reimburse Jane Crist's attorney's fees comes within the ambit of alimony.

Part III: Equal Protection Challenge

Both Pinkerton and Crist invoke the protections of the Fifth Amendment and claim that they should be absolvved from paying alimony to their former wives because the non-discharge provision of § 17(a)(7) creates a gender classification which violates the equal protection aspect of the due process clause.[4] They claim that

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4. In Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Supreme Court noted that the Fifth Amendment due process clause contains an equal protection component. Fifth Amendment equal protection claims are considered in exactly the same manner as claims under the Fourteenth Amendment equal protection clause. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975).

because § 17(a)(7) would allow their former wives to secure a discharge of an alimony or support debt, denying them such a discharge is unconstitutional.

Over the past decade the Supreme Court has considered, in a long progression of cases, the vitality of statutes and regulations which classify individuals differently solely on the basis of sex. Frequently, when these laws are reviewed under the magnifying glass of the equal protection clause, their raison d'etre evaporates,[5]

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5. The Supreme Court has consistently invalidated statutes which create "archaic and overbroad generalizations" about women, Schlesinger v. Ballard, 419 U.S. 498, 508, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975), which automatically assume that women are the weaker sex, Stanton v. Stanton, 421 U.S. 7, 15, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), and which establish gender-based distinctions "solely for the purpose of achieving administrative convenience", Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

resulting in declarations of unconstitutionality.[6] In a recent pronouncement the Supreme Court reiterated the standard under which gender classifications statutes must be judged: "[O]ur precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must by [sic] substantially related to the achievement of those objectives." Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107, 115 (1980).

One type of statute containing a gender-based discrimination has passed constitutional muster.

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6. See, e.g., Wengler v. Druggists Mut. Ins. Co., supra; Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); Stanton v. Stanton, supra, Weinberger v. Wiesenfeld, supra; Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Frontiero v. Richardson, supra; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Reed v. Reed 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

The Supreme Court has upheld statutes designed to alleviate "the disparity in economic condition between men and women caused by the long history of discrimination against women." Califano v. Webster, 430 U.S. 313, 317, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977). See also Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

In Crist, the district court determined that § 17(a)(7) did create a gender-based distinction involving alimony, but concluded that this provision survived constitutional challenge under the shelter of Kahn. Both appellees before us urge a Kahn analysis in support of their positions. Recourse to a Kahn compensation rationale is helpful and

enlightening, but inadequate.[7] Although the Supreme Court has approved statutes which indemnify women for past discrimination, the Court has not accepted blanket declarations of this objective as justification for gender-based distinctions. Rather, the Court requires an investigation as to "whether women [have] in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification." Orr v. Orr,

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7. We disagree with the district court in Crist that a Kahn compensation justification would immunize § 17(a)(7). The Supreme Court applied this rationale only after emphasizing and concluding that a very strong governmental interest was served by the gender classification. Webster, 430 U.S. at 318, 97 S.Ct. at 1195; Ballard, 419 U.S. at 510, 95 S.Ct. 578; Kahn, 416 U.S. at 355, 94 S.Ct. at 1737. In Wengler, the Supreme Court indicated that the government's interest in the area of maintenance and support for spouses is not strong enough to shield the legislation under a Kahn compensation haven. 446 U.S. at 148 n. 4, 100 S.Ct. 1544 n. 4. See also Hull Sex Discrimination and the Equal Protection Clause; An Analysis of Kahn v. Shevin and Orr v. Orr, 30 Syracuse L.Rev. 639 (1979); Note, Alimony Awards Under Middle-Tier Equal Protection Scrutiny, 59 Neb. L.Rev. 172, 181-85 (1980).

440 U.S. 268, 281, 99 S.Ct. 1102, 1112, 59 L.Ed.2d 306 (1979). In Orr, the Court rejected the gender classification in Alabama's alimony laws which limited alimony payments to wives, reasoning that a Kahn compensation justification, which automatically presumes that a woman has suffered discrimination, is insufficient to sustain a gender-biased law when the proceedings envisioned are sufficiently designed to ferret out this information. As the Court said:

> Under the [Alabama alimony] statute, individualized hearings at which the parties' relative financial circumstances are considered already occur.... [S]ince individualized hearings can determine which women were in fact discriminated against vis a vis their husbands ..., Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex.

440 U.S. at 281-82, 99 S.Ct. at 1112-13.

It has also been suggested[8] that the term "spouse" be substituted for the term "wife," instantly rendering § 17(a)(7) gender neutral.[9] In support of this proposition, we are invited to examine Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966), where the Supreme Court addressed the interpretation of the term "transfer" as contained

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8. This argument is raised by Betty Jane Pinkerton and the Bankruptcy Court in Pinkerton.

9. Section 523(a)(5) of the Bankruptcy Reform Act of 1978, which became operative on October 1, 1979, is analogous to § 17(a)(7) with one exception: It is gender neutral. 11 U.S.C. § 523(a)(5) provides:

> A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that--
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

in § 70(d)(5) of the Bankruptcy Act. Noting that "we do not read these statutory words with the ease of a computer," the Court said "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." 385 U.S. at 103, 87 S.Ct. at 277. Essentially, this decision counsels liberal construction of the Bankruptcy Act in light of the purpose of the provision under consideration.

We find an early expression of the perceived purpose of § 17(a)(7) in Wetmore v. Markoe, 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904), where the Court was considering the forerunner[10] of the non-

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10. The 1903 amendments to the Bankruptcy Act of 1898, which contained alimony and support non-discharge provisions for the first time, were carried forward and incorporated into the Bankruptcy Act of 1938. They remained substantially unchanged in the 1970 amendments to the Bankruptcy Act of 1938. 1A Collier on Bankruptcy ¶ 17.18 at 1668-69 (14th ed. 1978).

discharge provision we now review. While the case involved provability of a debt under the 1898 Bankruptcy Act, the Court discussed the nondischargeability of a support obligation under the 1903 Bankruptcy Act and stated:

> The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce.

196 U.S. at 77, 25 S.Ct. at 175. As Wetmore indicates, the underlying purpose of the non-discharge status for the support provision was specifically to aid wives and children by insuring that husbands could not disentangle themselves from their support obligations. Since the support provision was designed by Congress in 1903 to aid women, we have neither the authority nor the desire to act for Congress by transforming the term "wife" to "spouse"

under the supposed marching orders of Bank of Marin. Moreover, in Westcott, Wiesenfeld and Goldfarb, supra, when faced with interpretative situations identical with that we now face, the Supreme Court declined to substitute the term "surviving spouse" for "widow." Instead, the Court applied an equal protection analysis in scrutinizing the statutes as written. We shall not follow the route suggested by the bankruptcy court in Pinkerton, for the Supreme Court has clearly marked that route as legally impassable.

We advance to the final theory tendered in support to § 17(a)(7) which was discussed by the district court in Pinkerton and submitted in the briefs and arguments of both appellees. This argument is premised on the thesis that § 17(a)(7) contains two discrete and independent provisions which are separated by a comma and the disjunctive

"or." The critical language of § 17(a)(7) it: "alimony due or to become due, or for maintenance or support of wife or child." The alimony clause portion of the foregoing excerpt contains no reference to either sex and it is forcefully argued that it is gender neutral and therefore constitutional.

The district judge in Pinkerton adroitly distinguished alimony and support. Because of our resolution of these disputes we do not reach that question, but note the persuasiveness of his reasoning.[11]

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11. One must consider the canons of construction which support a distinction between alimony and support, including the doctrine of last antecedent, Quindlen v. Prudential Insurance Company of America, 482 F.2d 876 (5th Cir. 1973); the mandate that courts give effect, whenever possible to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous, General Motors Acceptance Corporation v. Whisnant, 387 F.2d 774 (5th Cir. 1968); and consideration of the use of the disjunctive "or" between two terms, Reiter v. Sonotone Corp., 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Further, alimony is defined in a gender neutral

The Remedy

We conclude that, by providing the benefit of non-dischargeability of debts

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fashion by the laws of Georgia (Ga. Code Ann. § 30-201) and Florida (Fla.Stat.Ann. § 61.08).

Finally, there are other significant differences between alimony and maintenance and support. The maintenance and support clause is limited to a segment of the familial unit--wives and children. Alimony, derived from the Latin words "alimonia" and "alere," has long been recognized as including the sustenance, norishment or support obligations provided by ascendants for descendants, descendants for ascendants, as well as spouses for each other. For example, see Louisiana Civil Code arts. 229, 230 and 231, which provide:

> Art. 229. Reciprocal alimentary duties of ascendants and descendants
>
> Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal.
>
> They are also bound to render reciprocally all the services which their situation can require, if they should become insane.
>
> Art. 230. Scope of alimentary obligation
>
> By alimony we understand what is necessary for the nourishment, lodging and support of the person who claims it.

for alimony and support owed to wives but not to husbands--or, to state it another way, by providing the benefit of dischargeability of such debts owed by wives but not those owed by husbands--§ 17(a)(7) violates the equal protection component of the due process clause of the Fifth Amendment. The remaining question is whether

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It includes the education, when the person to whom the alimony is due, is a minor.
Art. 231. Basis for granting alimony
Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it.

Additionally, La.Civil Code article 148 details alimentary obligations for the wife in a situation of judicial separation or divorce.

Civil Code article 229, which establishes reciprocal alimony duties between ascendants and descendants, is found in the Louisiana Civil Code of 1870, the Civil Code of 1825, the predecessor codification of 1808, as well as in the Code of Napoleon of 1804. It is hardly a new kid on the block.

declare the entire subsection a nullity and deny its benefits to both groups, or to extend its coverage and provde equal benefits to both groups. We opt for the latter, following the path blazed by the Supreme Court in, inter alia, Califano v. Westcott, supra, Califano v. Goldfarb, supra, Weinberger v. Wiesenfeld, supra, and Wengler v. Druggists Mut. Ins. Co., supra.

In Westcott, the Supreme Court held that § 407 of the Social Security Act, 42 U.S.C. § 607, which provides benefits for dependent children of unemployed fathers but not those of unemployed mothers, violated the due process clause of the Fifth Amendment because it discriminated on the basis of gender. The district court remedy for the constitutional deprivation was the extension of benefits to cover those not included. The Supreme Court affirmed.

In Goldfarb, the Court found that the different treatment of men and women mandated by 42 U.S.C. § 402(f)(1)(D) constituted invidious discrimination. The Court found that the provisions of the statute limiting benefits received by a widower to less than those received by a widow were unconstitutional. To correct the constitutional defect, the three-judge trial court ordered that the benefits provided to widows be extended to widowers. The Supreme Court affirmed.

In Wiesenfeld, the Court upheld a three-judge court finding that 42 U.S.C. § 402(g), which provided social security survivor's benefits to widows but not to widowers, was unconstitutional. The three-judge court

enjoined the continued refusal to pay § 402(g) benefits to widowers solely on the basis of sex. The Supreme Court affirmed.

In Westcott, Goldfarb, and Wiesenfeld the Court's remedy for the constitutional infirmity of the challenged federal statutes was to extend the benefits to the excluded class.

Finally, we note the decision in Wengler which involved a state workers' compensation statute found to violate the Equal Protection Clause of the Fourteenth Amendment. The statute granted a conclusive presumption of dependency to wives but did not grant that presumption to husbands. The Court remanded the case to the state court, noting:

> We are left with the question whether the defect should be cured by extending the presumption of dependence to widowers of by eliminating it for widows. Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation.

446 U.S. at 152, 100 S.Ct. at 1547.

We conclude that the proper remedy in the cases at bar is to extend the benefits of § 17(a)(7) to the excluded class. Accordingly, either a husband or wife receiving alimony or maintenance or support may assert the non-dischargeability of the obligation under § 17(a)(7).

Part IV: Voidable Preference

James Crist alternatively contends that the alimony payments due his ex-wife constitute a voidable preference under § 60 of the Bankruptcy Act, 11 U.S.C. § 96. We find this argument totally devoid of merit.

Conclusion

The judgments of the district courts are affirmed insofar as they hold that the obligations involved are alimony and, as such, are not discharged by virtue of the bankruptcy adjudication. Both cases are remanded in order that the district courts

may enter judgment for the principal, interest and, as appropriate, attorney's fees.

Each case is AFFIRMED and REMANDED for further proceedings not inconsistent herewith.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

In the matter of:

JAMES F. CRIST, JR., BANKRUPTCY FILE

Debtor,

JAMES F. CRIST, JR.,

Plaintiff,

v. NUMBER B77-1759A

JANE S. CRIST,

Defendant

ORDER

This action is before the Court on appeal from a decision by United States Bankruptcy Judge Robinson filed on May 17, 1978. The plaintiff-debtor appeals the bankruptcy judge's ruling on his motion to determine the dischargeability of Jane S. Crist's claims in this Chapter XII proceeding.

The motion for a determination was heard by the bankruptcy judge on February 24, 1978.

As a result of that hearing, the bankruptcy judge made the following twenty-four findings of fact:

1. On March 4, 1977, James F. Crist, Jr. (hereinafter, "Debtor") and Jane S. Crist (hereinafter, "Defendant") were divorced by order of the Superior Court of Fulton County, Georgia according to the terms of the Final Judgment and Decree (Joint Exhibit 1) entered that day.

2. Said Final Judgment and Decree was based upon the Stipulation placed in the Record of the divorce action by the Court (Joint Exhibit 2) on February 9, 1977.

3. On March 29, 1977, a Separation Agreement was reached and executed by the parties (Joint Exhibit 3, hereinafter, "Separation Agreement").

4. On March 30, 1977, another order (Joint Exhibit 4, hereinafter "Order") was entered in the divorce case completely

amending the Final Judgment and Decree and fully incorporating the Separation Agreement.

5. Under the terms of the Order, the Defendant was awarded a judgment against the Debtor which included $30,000.00 in cash (Paragraph 4.A of the Separation Agreement), $350.00 per month termed alimony (Paragraph 4.B) until such time as the $30,000.00 cash payment required by Paragraph 4.A of the Separation Agreement was paid in full, and $5,000 in attorneys fees awarded to Defendant's Attorney John C. Gray (Paragraph 4.G). No monetary limit was included within the terms of the Order and Separation Agreement restricting the total amount of monthly alimony payments that could be required before the monthly alimony payments could be terminated by the Debtor. Pursuant to the Order, Defen-

dant was also to receive $350.00 per month as child support for her minor daughter.

6. Additionally, under the terms of the Separation Agreement and Order the Debtor was required to transfer to the Defendant all right, title and interest in a 1974 Oldsmobile Vista Cruiser Station Wagon (Paragraph 4.C) and all items listed in Exhibit "B" (Paragraph 4.D) and Exhibit "G" to the Separation Agreement.

7. Pursuant to the Separation Agreement (Joint Exhibit 3) and Order, Debtor executed two promissory notes, one in the amount of $30,000.00 (Joint Exhibit 5) to evidence his obligation under Paragraph 4.A of the Separation Agreement and another in the amount of $5,000.00 (Joint Exhibit 6) to evidence his attorney's fee obligation under Paragraph 4.G of the Separation Agreement.

8. The Debtor also executed a "Debt Obligation" (Joint Exhibit 7) to evidence

the $350.00 per month alimony obligation under Paragraph 4.B of the Separation Agreement.

9. In addition, the Debtor executed a "Deed to Secure Debt" (Joint Exhibit 8) pursuant to Paragraph 4.H of the Separation Agreement and Order which was properly filed and recorded March 30, 1977, for the purpose of securing the payments required by the notes (Joint Exhibits 5 and 6) and the Debt Obligation (Joint Exibit 7).

10. On March 29, 1977, Debtor paid the Defendant $7,500.00, five thousand of which was pursuant to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separation Agreement and Order and $2,500.00 of which was pursuant to the $5,000.00 Note (Joint Exhibit 6) and Paragraph 4.G. of the Separation Agreement and Order.

11. On April 29, 1977, Debtor paid the Defendant an additional $2,500.00 pursuant

to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separation Agreement and Order.

12. Additionally, Debtor made monthly alimony payments of $350.00 per month during April and May of 1977 pursuant to the Debt Obligation (Joint Exhibit 7) and Paragraph 4.B. of the Separation Agreement and Order.

13. No further monthly alimony payments have been made since the May, 1977 payment. Permanent monthly alimony payments required by Paragraph 4.B. of the Separation Agreement and Order which were not made to the date of the trial (February 24, 1978) total $3,150.00.

14. All items of personal property listed on Exhibit "G" of the Separation Agreement as incorporated in the Order belonged to the Debtor prior to the execu-

tion of the Separation Agreement and were transferred to the Defendant pursuant to the Separation Agreement and Order in lieu of back alimony and child support due prior to February 21, 1977. This transfer was effective as of the date of execution of the Separation Agreement.

15. Ownership of the items listed in Exhibit "B" of the Separation Agreement as incorporated in the Order prior to the execution of the Agreement is stipulated in Joint Exhibit 9. All these items were transferred to the Defendant's ownership upon execution of the Separation Agreement.

16. The title to the 1974 Oldsmobile Vista Cruiser Station Wabon referred to in Paragraph 4.C. of the Separation Agreement was in the Debtor when the Agreement was signed. Title to this automobile has been transferred to the Defendant pursuant to the terms of the Separation Agreement and Order.

17. The shares of "Old Republic" stock referred to in Paragraph 4.F. of the Separation Agreement belonged to the Defendant at the time the Agreement was executed.

18. On July 30, 1977, the value of the Rivermeade residence owned in fee simple by the Debtor exceeded the outstanding loan balance of the first lien security interest held by Charter Mortgage Company and the outstanding balance of the second lien security interest held by Fidelcorp Mortgage Corporation by more than $35,000.00.

19. Joint Exhibit 11 contains true and correct copies of discovery pleadings filed in the divorce action between the parties.

20. Joint Exhibit 12 contains compilations of checking account activity and other financial data compiled by counsel for the Defendant prior to approximately February 9, 1977.

21. The $30,000 cash payment required to be made by the Debtor to the Defendant by Paragraph 4.A. of the Separation Agreement and Order was intended by the parties to that Agreement to cushion the Defendant-wife during the transition period following the divorce, to help her re-establish herself economically and to contribute towards her maintenance and support.

22. The $350.00 per month alimony payment required to be made by the Debtor to the Defendant by Paragraph 4.B. of the Separation Agreement and Order was intended by the parties to that Agreement to provide for and contribute towards the maintenance and support of the Defendant-wife.

23. The transfer to the Defendant of the 1974 Oldsmobile Vista Cruiser Station Wagon and all those items listed in Exhibits "B" and "G" of the Separation Agreement not already owned by the Defendant pursuant

to the Separation Agreement and Order were intended by the parties to that Agreement to cushion the Defendant during the transition period following the divorce, to help her re-establish herself economically, and to contribute toward her maintenance and support.

24. Neither Defendant nor her agent had reasonable cause to believe that the Debtor was insolvent at the time of any transfers of property and money by the Debtor to the Defendant pursuant to the Separation Agreement and Order and the documents created and executed pursuant thereto.

On appeal the Debtor has raised several objections to the lower Court's conclusions of law. He primarily asserts that Section 17(a)(7) of the Bankruptcy Act, 11 U.S.C. § 35(a)(7), is constitutionally invalid under the due process clause of the Fifth

Amendment because of its impermissible gender-based distinctions. The Debtor also contests the bankruptcy judge's finding that a March 30, 1977 Order, incorporating the Separation Agreement constituted the final step in a novation, creating a new obligation running from the Debtor to the defendant and extinguishing the old one.

Finally, the Debtor objects to the bankruptcy judge's conclusion that the property transfers to the defendant did not create a voidable preference under Section 60 of the Bankruptcy Act, 11 U.S.C. § 96. Since the Court finds that each of the contested transfers comes within the terms of Section 17(a)(7) of the Bankruptcy Act and the terms of that Section do not make an impermissible gender based distinction, the two latter objections of the Debtor need not be considered.

Section 17(a)(7) of the Bankruptcy Act provides in pertinent part, as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ..... (7) are for alimony due or to become due, or for maintenance or support of wife or child...

11 U.S.C. § 35(a)(7). The plaintiff contends Section 17(a)(7) is constitutionally invalid in that its exclusive reliance upon gender allows for the conference of benefits and burdens based solely on sexually related assumptions as to dependency. Traditional equal protection analysis requires that a legislative classification, "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 235 U.S. 412, 415 (1920).

The Supreme Court has held that classifications distinguishing between the sexes are "subject to scrutiny under the equal protection clause." Reed v. Reed, 404 U.S. 71, 75 (1971).

While gneder based classifications are subject to scrutiny under the equal protection clause, they are not inherently unconstitutional. "To withstand constitutional challenge, previous cases established that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). The Supreme Court has recognized reduction of the disparity in the economic condition between men and women caused by the long history of discrimination against women as such an important governmental objective. Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416, U.S. 351 (1974).

The Supreme Court's decision in Kahn is especially instructive. In Kahn the Court upheld a Florida Statute providing a $500 property tax exemption for widows, but not for widowers. The Court considered the financial difficulties facing the widowed female in contrast to those facing the widowed male. The rationale relied on by the Court in Kahn is equally applicable to the divorced female. Especially pertinent is the Court's statement that:

> While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer. (footnote omitted)

Kahn, 416 U.S. at 354.

This Court is well aware that gender based distinctions must be justified by more than "archaic and overbroad" generalizations, Schlesinger v. Ballard, 419 U.S.

at 508, about female dependency or female inability to cope in the marketplace. Although spurning such absurdities, the Court recognizes that a divorced female, like a widow, is now likely to encounter more difficulty in meeting financial obligations than a divorced male. This is especially true during the time immediately following a divorce. By serving the important governmental objectives delineated in Kahn, and recognized in federal legislation, see Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., Section 17(a)(7) satisfies the constitutional requirements for gender based classifications as stated in Craig v. Boren, 429 U.S. at 197.

As used in Section 17(a)(7), the term "alimony" carries no sexual connotation. Although the section specifies that debts for the maintenance of a wife are not dis-

chargeable, this does not preclude its application to a female bankrupt who is paying alimony. In abstract terms then, Section 17(a)(7) does not make a gender based distinction. The gender based distinction arises only in the context of applying Georgia law to the Statute. In Georgia, alimony may not be awarded to the ex-husband. Ga. Code Ann. § 30-201; Murphy v. Murphy, 232 Ga. 252 (1974) cert. den. 421 U.S. 929 (1974); Mack v. Mack, 234 Ga. 692 (1974). In Murphy, the Georgia Supreme Court held that sex based distinctions in Georgia's alimony laws had a fair and substantial relation to the purpose of the legislation, which was to provide support for the dependent wife of a broken marriage. Murphy, 232 Ga. at 353.

In the present action the Debtor is apparently seeking a collateral attack on the award of alimony to his ex-wife. Such

a contest would be more properly held in the State Court which made the alimony award. The bankruptcy laws should not be used as a tool to evade those obligations, nor are the bankruptcy laws the proper medium for an attack on Georgia's alimony laws.

The only question left for determination is whether or not the money and property awarded to the defendent [sic] as a result of her divorce came within the coverage of Section 17(a)(7). In findings of fact numbered 21, 22, and 23, the bankruptcy court held that the property transferred contributed to the maintenance and support of the Debtor's wife. It is a well established rule that the district court is bound by the bankruptcy judge's findings of fact unless they are clearly erroneous. In re Mascolo, 505 F.2d 274, 277 (1st Cir. 1974); In re American Packers Exchange,

Inc., 449 F.2d 1313 (1st Cir. 1977). There has been no showing that the referenced findings of fact are erroneous and they are adopted by this Court.

Accordingly, the Plaintiff-Debtor's appeal from the determination of the bankruptcy judge is DENIED.

So ORDERED, this the 21st day of September, 1978.

/s/ Harold L. Murphy
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JAMES F. CRIST, JR.,: BANKRUPTCY CASE NUMBER:

Debtor : B77-1759A

JAMES F. CRIST, JR.,: JUDGMENT

Plaintiff/Appellant:

vs. :

JANE S. CRIST, :

Defendant/Appellee :

This action came on for consideration before the Court, Honorable Harold L. Murphy, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff-Debtor's appeal from the determination of the bankruptcy judge is DENIED.

Dated at Atlanta, Georgia, this 27th day of September, 1978.

BEN H. CARTER
Clerk of Court

By: /s/ Rebecca Laury
Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

IN THE MATTER OF:	:	
JAMES F. CRIST, JR.,	:	CASE NO. B77-1759A
Debtor,	:	
JAMES F. CRIST, JR.,	:	
Plaintiff,	:	
v.	:	
JANE S. CRIST,	:	Chapter XII
Defendant.	:	proceedings

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-styled action having regularly come on for trial of all issues before this Court on February 24, 1978, and said trial having been held at that time, the Court makes the following Findings of Fact and draws the following Conclusions of Law with respect thereto:

FINDINGS OF FACT

1. On March 4, 1977, James F. Crist, Jr. (hereinafter, "Debtor") and Jane S. Crist (hereinafter, "Defendant") were divorced by order of the Superior Court of Fulton County, Georgia according to the terms of the Final Judgment and Decree (Joint Exhibit 1) entered that day.

2. Said Final Judgment and Decree was based upon the Stipulation placed in the Record of the divorce action by the Court (Joint Exhibit 2) on February 9, 1977.

3. On March 29, 1977, a Separation Agreement was reached and executed by the parties (Joint Exhibit 3, hereinafter, "Separation Agreement").

4. On March 30, 1977, another Order (Joint Exhibit 4, hereinafter "Order") was entered in the divorce case completely amending the Final Judgment and Decree and fully incorporating the Separation Agreement.

5. Under the terms of the Order, the Defendant was awarded a judgment against the Debtor which included $30,000.00 in cash (Paragraph 4.A of the Separation Agreement), $350.00 per month termed alimony (Paragraph 4.B) until such time as the $30,000.00 cash payment required by Paragraph 4.A of the Separation Agreement was paid in full, and $5,000 in attorneys fees awarded to Defendant's Attorney John C. Gray (Paragraph 4.G). No monetary limit was included within the terms of the Order and Separation Agreement restricting the total amount of monthly alimony payments that could be required before the monthly alimony payments could be terminated by the Debtor. Pursuant to the Order, Defendant was also to receive $350.00 per month as child support for her minor daughter.

6. Additionally, under the terms of the Separation Agreement and Order the Debtor

was required to transfer to the Defendant all right, title and interest in a 1974 Oldsmobile Vista Cruiser Station Wagon (Paragraph 4.C) and all items listed on Exhibit "B" (Paragraph 4.D) and Exhibit "G" to the Separation Agreement.

7. Pursuant to the Separation Agreement (Joint Exhibit 3) and Order, Debtor executed two promissory notes, one in the amount of $30,000.00 (Joint Exhibit 5) to evidence his obligation under Paragraph 4.A of the Separation Agreement and another in the amount of $5,000.00 (Joint Exhibit 6) to evidence his attorney's fee obligation under Paragraph 4.G of the Separation Agreement.

8. The Debtor also executed a "Debt Obligation" (Joint Exhibit 7) to evidence the $350.00 per month alimony obligation under Paragraph 4.B of the Separation Agreement.

9. In addition, the Debtor executed a "Deed to Secure Debt" (Joint Exhibit 8) pursuant to Paragraph 4.H of the Separation Agreement and Order which was properly filed and recorded March 30, 1977, for the purpose of securing the payments required by the notes (Joint Exhibits 5 and 6) and the Debt Obligation (Joint Exhibit 7).

10. On March 29, 1977, Debtor paid the Defendant $7,500.00, five thousand dollars of which was pursuant to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separation Agreement and Order and $2,500.00 of which was pursuant to the $5,000.00 Note (Joint Exhibit 6) and Paragraph 4.G. of the Separation Agreement and Order.

11. On April 29, 1977, Debtor paid the Defendant an additional $2,500.00 pursuant to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separation Agreement and Order.

12. Additionally, Debtor made monthly alimony payments of $350.00 per month during April and May of 1977 pursuant to the Debt Obligation (Joint Exhibit 7) and Paragraph 4.B. of the Separation Agreement and Order.

13. No further monthly alimony panyments have been made since the May, 1977 payment. Permanent monthly alimony payments required by Paragraph 4.B. of the Separation Agreement and Order which were not made to the date of the trial (February 24, 1978) total $3,150.00.

14. All items of personaly property listed on Exhibit "G" of the Separation Agreement as incorporated in the Order belonged to the Debtor prior to the execution of the Separation Agreement and were transferred to the Defendant pursuant to the Separation Agreement and Order in lieu of back alimony and child support due prior to February 21, 1977. This transfer

was effective as of the date of execution of the Separation Agreement.

15. Ownership of the items listed in Exhibit "B" of the Separation Agreement as incorporated in the Order prior to the execution of the Agreement is stipulated in Joint Exhibit 9. All these items were transferred to the Defendant's ownership upon execution of the Separation Agreement.

16. The title to the 1974 Oldsmobile Vista Cruiser Station Wagon refered to in Paragraph 4.C. of the Separation Agreement was in the Debtor when the Agreement was signed. Title to this automobile has been transferred to the Defendant pursuant to the terms of the Separation Agreement and Order.

17. The shares of "Old Republic" stock referred to in Paragraph 4.F. of the Separation Agreement belonged to the Defendant at the time the Agreement was executed.

18. On July 30, 1977, the value of the Rivermeade residence owned in fee simply by the Debtor exceeded the outstanding loan balance of the first lien security interest held by Charter Mortgage Company and the outstanding balance of the second lien security interest held by Fidelcorp Mortgage Corporation by more than $35,000.00.

19. Joint Exhibit 11 contains true and correct copies of discovery pleadings filed in the divorce action between the parties.

20. Joint Exhibit 12 contains compilations of checking account activity and other financial data compiled by counsel for the Defendant prior to approximately February 9, 1977.

21. The $30,000 cash payment requried to be made by the Debtor to the Defendant by Paragraph 4.A. of the Separation Agreement and Order was intended by the parties to that Agreement to cushion the Defendant-

wife during the transition period following the divorce, to help her re-establish herself economically and to contribute towards her maintenance and support.

22. The $350.00 per month alimony payment required to be made by the Debtor to the Defendant by Paragraph 4.B. of the Separation Agreement and Order was intended by the parties to that Agreement to provide for and contribute towards the maintenance and support of the Defendant-wife.

23. The transfer to the Defendant of the 1974 Oldsmobile Vista Cruiser Station Wagon and all those items listed in Exhibits "B" and "G" of the Separation Agreement not already owned by the Defendant pursuant to the Separation Agreement and Order were intended by the parties to that Agreement to cushion the Defendant during the transition period following the divorce, to help her re-establish herself economically,

and to contribute toward her maintenance and support.

24. Neither Defendant nor her agent had reasonable cause to believe that the Debtor was insolvent at the time of any transfers of property and money by the Debtor to the Defendant pursuant to the Separation Agreement and Order and the documents created and executed pursuant thereto.

CONCLUSIONS OF LAW

1. Section 17a(7) of the Bankruptcy Act (11 U.S.C. Section 35(a)(7) does not violate the Due Process clause of the Fifth Amendment to the Constitution of the United States.

2. The gender-based classification contained in Section 17a(7) of the Bankruptcy Act is constitutional because it has a fair and substantial relation to the

important governmental objective of insuring the continued support of the dependent wife of a broken marriage.

3. The $350.00 per month alimony payment required to be made by the Debtor to the Defendant by Paragraph 4.B. of the Separation Agreement and Order was intended by the parties to that Agreement to provide for and contribute towards the maintenance and support of the Defendant and is not dischargeable by the Debtor in Bankruptcy, but is protected from discharge by Section 17a(7) of the Bankruptcy Act (11 U.S.C. Section 35(a)).

4. The $5000 in attorney's fees required to be paid by the Debtor to the Defendant and her attorney by Paragraph 4.G. of the Separation Agreement and Order is a part of temporary alimony awarded for the purpose of enabling the Defendant to contest the issues raised in the divorce

proceeding, and as such these attorney's fees are not dischargeable by the Debtor in Bankruptcy, but are protected from discharge by Section 17a(7) of the Bankruptcy Act.

5. The $30,000 cash payment required to be made by the Debtor to the Defendant herein by Paragraph 4.A. of the Separation Agreement and Order was intended by the parties to that Agreement to cushion the Defendantwife during the transition period following the divorce, to help her re-establish herself economically and to contribute towards her maintenance and support; and as such this cash award and any partial payment of the same is not dischargeable in Bankruptcy by the Debtor, but is protected from discharge by Section 17a(7) of the Bankruptcy Act.

6. The required transfer to the Defendant of the 1974 Oldsmobile Vista Cruiser

Station Wagon and all those items listed in Exhibits "B" and "G" of the Separation Agreement not already owned by the Defendant pursuant to the Separation Agreement and Order was intended by the parties to that Agreement to cushion the Defendant-wife during the transition period following the divorce, to help her re-establish herself economically, and to contribute toward her maintenance and support, and as such these obligations are not dischargeable in Bankruptcy by the Debtor, but are protected from discharge by Section 17a(7) of the Bankruptcy Act.

7. The Debtor's March 29, 1977, payment to the Defendant of $7,500.00, five thousand of which was pursuant to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separation Agreement and Order and $2,500.00 of which was pursuant to the $5,000 Note (Joint Exhibit 6) and Paragraph

4.G. of the Separation Agreement and Order did not have the effect of enabling the Defendant to obtain a greater percentage of her debt than some other creditor of the same class and did not, and does not, constitute a voidable preference under Section 60 of the Bankruptcy Act.

8. The Debtor's April 29, 1977 payment to the Defendant of $2,500.00 pursuant to the $30,000.00 Note (Joint Exhibit 5) and Paragraph 4.A. of the Separationa Agreement and Order did not have the effect of enabling the Defendant to obtain a greater percentage of her debt than some other creditor of the same class and did not, and does not, constitute a voidable preference under Section 60 of the Bankruptcy Act.

9. It is not equitable or just under the facts of this case to subordinate the claims of the Defendant to those of the other creditors as requested by Debtor.

10. The Final Judgment and Decree as embodied in the Separation Agreement and Order awarding alimony and support and maintenance to the Defendant-wife and child, is not a debt put in the form of a judgment, but is rather a legal means of enforcing the obligation and duty of the Debtor-husband and father to support his wife and child. He owes this duty and obligation not because of any debt due the Defendant, but because of the policy of the law, and it is the obligation based on this duty which is saved from discharge in bankruptcy by Section 17a(7) of the Bankruptcy Act.

11. The transfers of property and money by the Debtor to the Defendant pursuant to the Separation Agreement and Order and the documents created and executed pursuant thereto were not on account of an antecedent debt.

12. The March 30, 1977 Order incorporating the Separation Agreement constituted the final step in a novation which created an entirely new obligation running from the Debtor to the Defendant and extinguished the old one.

13. The Debtor's creation and execution of the Debt Obligation (Joint Exhibit 7), the $30,000.00 note (Joint Exhibit 5) and the $5,000.00 note (Joint Exhibit 6) and his creation and execution of the Deed to Secure Debt (Joint Exhibit 8) securing these obligations did not, and does not, constitute a voidable preference under Section 60 of the Bankruptcy Act.

May 16, 1978
Atlanta, Ga.

/s/ Hugh Robinson
HUGH ROBINSON
Bankruptcy Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

IN THE MATTER OF:	:	
JAMES F. CRIST, JR.,	:	CASE NO. B77-1759A
Debtor,	:	
JAMES F. CRIST, JR.,	:	
Debtor in pos-	:	
session, Plain:		
tiff	:	
v.	:	
JANE S. CRIST,	:	Chapter XII
Defendant.	:	proceedings

FINAL JUDGMENT

The within and foregoing matter having come on regularly before this Court for trial on February 24, 1978, and the same having been fully tried at that time with counsel for both the Plaintiff and Defendant present and participating; and upon the conclusion of said trial and submission of legal briefs on the testimony and

issues by all parties, it appearing to the Court that the Defendant is entitled to a Judgment against the Plaintiff James F. Crist, Jr. on all of the allegations of the Complaint:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, entered in favor of Defendant Jane S. Crist and against Plaintiff James F. Crist, Jr. on all of the allegations of Plaintiff's Complaint;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Findings of Fact and Conclusions of Law entered in this action on May 16, 1978, be made a part of this Final Judgment by reference and that the costs of this action be taxed against the Plaintiff James F. Crist, Jr.

This 23rd day of May, 1978.

/s/ Hugh Robinson
HUGH ROBINSON
Bankruptcy Judge

THE BANKRUPTCY ACT OF 1898

SECTION SEVENTEEN

(11 U.S.C. § 35)

§ 17. Debts Not Affected by a Discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceeding bankruptcy: Provided, however, That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the

bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (3) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for obtaining

money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision a of section

64 of this Act; (6) are due for moneys of an employee received or retained by his employer to secure faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS, CLERK

CASE NO. 80-1584

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1980

IN THE MATTER OF JAMES F. CRIST, JR.,

DEBTOR,

JAMES F. CRIST, JR., DEBTOR IN POSSESSION, APPELLANT,

PETITIONER

V.

JANE S. CRIST, APPELLEE,

RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES ALLEN RATZ
(COUNSEL OF RECORD)
GRAY, GILLILAND, GORDON & HINSON, P.C.
2310 PEACHTREE CENTER CAIN TOWER
229 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30303
(404) 659-5300

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I. SUMMARY OF ARGUMENT

While Petitioner has cast his presentation of questions to be reviewed by this Court in three parts, an examination of his Argument reveals that his objection to the ruling of the Fifth Circuit in Matter of Crist, 632 F.2d 1226 (Fifth Cir. 1980) is simply this: That by extending the benefits of Section 17a.(7) of the former Bankruptcy Act (11 U.S.C. §35a.(7)) to the excluded class (i.e., husbands), and thus protecting alimony, maintenance or support obligations owed by either spouse from discharge in bankruptcy, the court defeated the legislative purpose of that Section of the Bankruptcy Act. A careful and thoughtful examination of the purpose of this legislation reveals, however, that the Fifth Circuit's choice of remedy is not contrary to the intent and purpose of Congress in enacting

Section 17a.(7), but rather that this remedy clearly carries out and is consonant with the overall purpose and intent of Congress in enacting this provision; i.e., to exempt from discharge in bankruptcy those moral and legal obligations owed by a debtor to his dependents for alimony, support and maintenance.

Moreover, a review of the prior decisions of this Court on the question of remedial alternatives where a statute is declared unconstitutional because of underinclusiveness, demonstrates that the remedy chosen by the Fifth Circuit meets the criteria set out therein for choosing an appropriate remedy; i.e., (1) the remedy is consistent with Congress' overall legislative purpose in enacting the subject statute; (2) the remedy does not impose a hardship on the beneficiaries whom Congress plainly

meant to protect; and (3) the remedy does not infringe upon Congressional prerogatives.

II. ARGUMENT

A. THE LEGISLATIVE PURPOSE OF SECTION 17a.(7) IS CONSISTENT WITH THE REMEDY APPLIED BY THE FIFTH CIRCUIT

The earliest and most authoritative statement of the legislative purpose behind Section 17(a.7) is found in Wetmore v. Markoe, 196 U.S. 68, 77, 25 S.Ct. 172, 49 L.Ed. 390 (1904):

> [T]he Bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it ever has been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, free from the obligation and responsibilities which may have resulted from

business misfortunes. (Emphasis added.)

As Wetmore indicates, the overall purpose of the Bankruptcy Act was to relieve the debtor of oppressive indebtedness which may have resulted from business misfortunes and give him a fresh start in business, but not at the expense of his dependents to whom he owes a moral and legal obligation of maintenance and support. The key word in this pronouncement, and the one which reveals the actual and basic intent of this Statute, is "dependent".

The fact that the statute speaks specifically of maintenance or support of the wife and not the husband, does not betray a purpose to benefit women as opposed to dependent women or dependents in general for several reasons. First, it is historical fact that in 1903 when this section was first incorporated into

the Bankruptcy Act, few states, if in fact any at all, imposed alimony and support obligations on wives. Wives were in law, if not always in fact, dependents of their husbands. Accordingly, Congress had no need to address the alimony, maintenance and support obligations of wives because they had none under the law, and the use of the word "wife" in the Statute was merely a recognition of the then existing state of the law and of society.

Second, the Statute does not abruptly end with the word "wife" as the Petitioner has quoted it at page 3 of his Petition, but rather it reads as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for maintenance or support or wife or child . . . . (emphasis added)

Thus, today, as in 1903, it was unquestioned that a man had the obligation to support and maintain his children. They were, and are today, his legal dependents. The fact that Congress grouped this obligation of support and maintenance of children together with that of support and maintenance of a wife in defining the exemption is a further demonstration of its focus on dependency as opposed to sex. A man's dependents under the law at the time this provision originally appeared in the Bankruptcy Act were his wife and children; and therefore, it was only natural for Congress to use the terminology it did in addressing the question of exemptions for obligations owed to dependents.

In fact the Court in Wetmore v. Markoe, supra, 196 U.S. 68, 77, clearly recognized and elucidated this state of

the law with respect to husband-wife relations when it stated:

> . . . the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and maintain and educate his children.

Thus, the overall purpose of Congress was to protect from discharge the obligations owed to legal dependents, who in 1903 (the year of enactment) happened to be the "wife" and "children" of a bankrupt husband and father. The recognition of this reality by use of the word "wife" cannot disguise the true purpose of the legislation.

Moreover, as indicated by the foregoing analysis, Congress did not have the concomitant purpose of declaring the obligations of a wife to her husband for alimony, support and

maintenance to be dischargeable as Petitioner contends. Wives did not have any such legal obligations which needed to be addressed in the Bankruptcy Act; and Congress, therefore, could not have intended to relieve them of nonexistent obligations. Accordingly, the Fifth Circuit's remedy does not contravene any legislative purpose of Congress to allow women to discharge such obligations; but rather it implements the true purpose of the legislation by extending relief to bankrupts of both sexes who have been adjudged entitled to and in need of alimony, maintenance and support by the domestic tribunals of the various States.

B. THE REMEDY APPLIED BY THE FIFTH CIRCUIT IS APPROPRIATE UNDER THE CRITERIA SET OUT FOR CHOOSING SUCH REMEDIES IN THE PRIOR DECISIONS OF THIS COURT.

1. The Remedial Outcome Is Consonant With Congress' Overall Purpose In Enacting The Statute

As pointed out by Petitioner, the Supreme Court in Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 (1979) has held that . . .

> Where a statute is defective because of underinclusiveness . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion. Quoting Mr. Justice Harlan's concurring opinion in Welsh v. United States, 398 U.S. 333, 361.

The choice of remedy is determined by several factors, not the least of which is the achievement of a remedial outcome consonant with the legislature's overall purpose in enacting the

statute. Wengler v. Druggists Mutual Insurance Company, 446 U.S. 142, 100 S.Ct. 540, 64 L.Ed. 2d 107 (1980). As demonstrated in Part II.A. of this Brief above, the overall legislative purpose of Congress as expressed in and through Section 17a.(7) of the Bankruptcy Act has been achieved by the remedy imposed by the Fifth Circuit.

2. The Remedy Does Not Impose A Hardship On The Intended Beneficiaries Of The Statute

Additionally, the remedy applied by a court should, if possible, be one that does not impose hardship on beneficiaries whom Congress plainly meant to protect. Califano v. Westcott, supra. Declaring this statute a nullity and depriving dependent wives of the benefit the Congress intended to bestow upon them would impose a severe hardship on such women. Moreover, it would

render a nullity countless State Court judgments and freely negotiated domestic settlement agreements obtained and entered into in reliance on their validity and future enforceability under the law prior to the effective date of the Bankruptcy Reform Act of 1978 (i.e., October 1, 1979). While there is no way of knowing how many wives may find themselves in the legal predicament of this Respondent, the growing number of cases which have been reported on this issue demonstrates that the hardship imposed by withdrawing the intended benefit would not be insubstantial.

On the other hand, extending the benefit of the Statute as the Fifth Circuit has done will not harm the intended beneficiaries at all; for as noted above, Congress never intended to relieve wives of their support obligations to their husbands.

3. The Remedy Does Not Infringe Upon Congressional Prerogatives

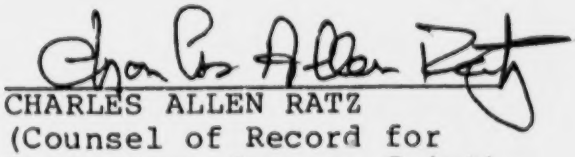
Finally, the court which is charged with selecting a remedy must take care not to infringe upon legislative prerogatives in its efforts to redress unconstitutional underinclusiveness. Califano v. Westcott, supra. The extension of the benefits of non-dischargeability by the Fifth Circuit was not such an infringement, but as pointed out above, it was merely an implementation of the overall purpose of Congress adjusted to suit the social and legal realities of 1980. Moreover, by the time the Fifth Circuit acted (December 17, 1980) Congress had already exercised any prerogative it might arguably have by enacting the Bankruptcy Reform Act of 1978 (effective October 1, 1979)

creating the precise remedy implemented by the Fifth Circuit. 11 U.S.C. §523(a)(5). Thus, far from usurping the power of Congress, the Fifth Circuit merely followed the lead of Congress in order to effectuate a just and equitable remedy in a situation in which Congress was then powerless to Act.

III. CONCLUSION

On these facts and for these reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



CHARLES ALLEN RATZ
(Counsel of Record for
Respondent Jane S. Crist)

GRAY, GILLILAND, GORDON & HINSON, P.C.
2310 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-5300

CERTIFICATE OF SERVICE

I, Charles Allen Ratz, hereby certify that I am a member of the Bar of the Supreme Court of the United States, that I represent the party on whose behalf the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit is filed, and that on April 15, 1981, I served counsel for all interested parties in the foregoing matter and the Solicitor General of the United States with the following number of copies by depositing those copies in the United States Mail in properly addressed envelopes with adequate first class postage thereon addressed to:

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3 John M. Sikes, Jr.
Macey & Zusmann
1795 Peachtree Road, N.E.
Atlanta, Georgia 30367

Attorneys for James F. Crist, Jr.

3 T. Brian Glass, Esq.
Suite 926, 400 Colony Square
Atlanta, Georgia 30361

Attorney for Frederick H.
Pinkerton, Jr.

3 Joseph J. Burton, Jr., Esq.
Swift, Currie, McGhee & Hiers
771 Spring Street, N.W.
Atlanta, Georgia 30308

Attorneys for Betty Jane
Pinkerton

3 Solicitor General
Department of Justice
Washington, D.C. 20530

All parties to be served have been served.

This 15TH day of April, 1981.

Charles Allen Ratz

GRAY, GILLILAND, GORDON & HINSON, P.C.
2310 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-5300